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No. 643

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Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

W. V. KNOTT, as State Treasurer and Ex-Officio Insurance Commissioner of the State of Florida, and NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY.

BRIEF OF D. M. LOWRY, RECEIVER IN THE STATE OF FLORIDA OF NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY, IN OPPOSITION TO THE PETITION OF THE UNITED STATES FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA, IN THE ABOVE STYLED CAUSE.

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D. M. Lowry, Receiver in the State of Florida of New Jersey Fidelity and Plate Glass Insurance Company, upon the considerations to be hereinafter set forth, respectfully submits that the petition for writ of certiorari in this cause should be denied.

Amplification of Statement By The Petitioner

The statement by petitioner is reasonably accurate, but it fails to give emphasis to certain phases of the procedure in the Circuit Court of Leon County, Florida, which this respondent believes are important. The first order made by the Circuit Court of Leon County, which adversely affected the United States, was made on May 28, 1934 (R. 199-201), wherein the Court said in part:

> "The Court is of the opinion, and doth so find that the securities were deposited by the surety company with the State Treasurer, as Insurance Commissioner, for the protection of the State of Florida and its citizens and political subdivisions; that this fund was segregated and set apart out of the general assets of the surety company prior to the accrual of any liens in favor of the United States and that the Legislature of the State of Florida, in enacting such legislation did so with the intention of protecting those for whom it had the power to legislate, and that it was not the intent and purpose of the Legislature to undertake to protect or secure claims or obligations due the Government of the United States. Entertaining these views, the Court is of the opinion that the Federal Government is not entitled to participate in the funds derived from the sale of securities deposited with the State Treasurer, as aforesaid, until and unless the claims of residents and citizens of the State of Florida, political subdivisions of the State of Florida, and the State of Florida, holding obligations arising out of surety bonds or surety contracts, shall have first been paid.

The Court is of the further opinion that after all claims arising out of surety bonds and surety contracts held and proven by residents of Florida, political subdivisions of Florida, of the State of Florida, shall have been paid by the Receiver, and that there should then remain a surplus in the hands of said Receiver, and that such surplus would thereupon become general assets of the said surety company, and that under Section 191, Title 31, of the United States Code Annotated, the United States Government would then have the prior right to participate in such surplus in the event it should not be made to appear that the said claims of the United States have not theretofore been paid."

No appeal was ever taken from the above order.

The order of the lower court, from which the appeal by the United States was taken, was that of October 27, 1934, (R. 254) five months after the making of the order above referred to, wherein the court found, in part, as follows:

"3. That after the payment of the claims hereinabove and heretofore allowed as payable, together with the costs, charges, and expenses of this receivership heretofore allowed, that the receiver do file with this court a statement of the net balance remaining in his hands as such receiver.

4. The question of what shall be done with the residue then remaining in the hands of the said receiver is reserved for the further order of the court and the relative rights of the United States and creditors whose claims are not secured by the special deposit or trust fund, as well as the claim of William H. Kelly, as Commissioner of Banking and Insurance of New

Jersey, for the payment to him of moneys alleged to have been expended by him in the interest of preservation of the assets of said surety company in the State of Florida, as well as the petition of the said William H. Kelly, as Commissioner of Banking and Insurance of the State of New Jersey, to receive the residue that will remain in the hands of the Receiver after the payment of all claims hereinabove allowed, is reserved for further determination of this court; since it appears that sufficient funds will remain in the hands of the said receiver after the payment of all claims of the United States as well as the claim of the said William H. Kelly for reimbursement, therefore, the payment of the claims herein and heretofore allowed will in no wise prejudice the United States, or the said William H. Kelly, nor the common creditors, to wit: Snedigar & Baya, N. R. Robinson and Joseph M. Schlesinger, on which claims decision is hereby reserved."

It will be observed that the decree of May 28th, held that the securities deposited by the New Jersey Fidelity and Plate Glass Insurance Company with the Treasurer of the State of Florida, constituted a trust fund for the benefit of the State of Florida, its citizens and political subdivisions, and that the claims of the United States could only be paid out of this trust fund in the event there remained a surplus after the payment of the beneficiaries of the trust fund.

It will also be observed that in the order appealed from, to-wit, the order of October 27th, 1934, the decision of the court was reserved as to the payment of the claims of the United States out of the residue in the hands of the Re-

ceiver, which residue the Court found was more than sufficient to pay all claims of the United States as well as all other unpaid claims. The appeal in the case was taken by William H. Kelly, and the United States became a cross-appellant by filing assignments of error, which appeal is on page 303-304 of the Record. The cross-assignments of error of the United States, and the appeal by William H. Kelly are directed to the order of October 27, 1934, and no appeal was taken from the order of May 28th, 1934.

After the order of October 27, 1934 was entered, the United States amended its claims for the evident purpose of bringing the claims within the protection of the Federal priority statute (R. 299 and R. 302). (1)

The conclusions of petitioner as to the holdings of the Supreme Court of Florida, are too meager to be accurate. The decision did not deny the United States "any right to participate in the fund in question", as stated in the petition, but denies that the United States had a prior right to the benefits of a trust fund established under the provisions of an Act of the Legislature of the State Florida, for the benefit of Florida claims. The decision recognized the right of the United States to be paid out of the residue remaining after the discharge of the trust, relative to which the court said in part as follows: (R. 356)

> "And in view of the provisions of the Federal Government's specially provided statutory rights under Section 191 and 192, Title 31 U. S. C. A., as against the general assets of the insolvent surety company

(1) NOTE: The date of the filing of the amendments of the claims of the United States and the order allowing the filing of same does not appear in the printed copy of the record before this Honorable Court, but the affidavit taken by the Notary on the 13th day of December 1934, shows that the amendments were sworn to before said Notary on that date.

enforceable against the general assets of the company in the hands of the domiciliary liquidator, or out of any residue of the special Florida deposits which may remain to be turned over to the domiciliary liquidator as general assets, after the satisfaction thereout of Florida claims, it would do violence to the ordinary rules of statutory construction to now so construe the Florida statutes as to make them inure to the special protection of the United States, as well as Florida creditors.

So the cross assignments of error filed by the United States on this appeal are overruled and the decision of the lower court as to the status of the claim interposed by the United States is approved as correct."

Questions Presented

1. Since no appeal was taken from the order of the Circuit Court of Leon County dated May 28th, 1934, determining the rights of the United States to have prior right of participation in the trust fund in the hands of the Receiver, and since the only question presented by the order of October 27th, 1934, from which the appeal was taken, reserved decision on the claims of the United States as to whether the Florida Receiver should pay the claims of the United States out of the residue or whether same should be transmitted to the domiciliary liquidator of the Surety Company in New Jersey, was the order appealed from a final judgment, so as to confer jurisdiction upon this court to review same by certiorari under the provisions of Section 237, Judicial Code, as amended by the Act of February 13, 1925, paragraph (b), Section 344 Title 28 U. S. C. A.?

2. Was the petitioner adversely affected by the order

appealed from, in view of the fact that more than ample funds remained in the hands of the Receiver for the payment of the claims of the United States as well as all other claims against the Receiver?

3. Since the funds in the hands of the Receiver were deposited pursuant to a State Statute, enacted by the Legislature of Florida in the exercise of its police power, would not the decision of the Supreme Court of Florida construing such statute, be binding upon this Honorable Court?

4. Since the Florida Supreme Court, in construing a State Statute, has held that the fund in the hands of the Receiver is a trust fund for the benefit of those for whom the State had the power and duty to legislate, is a substantial federal question presented herein merely because of the existence of the federal priority statute, which this court has held does not abrogate prior liens or bona fide transfers?

5. Do the allegations in the claims of the United States, without the amendments made subsequent to the date of the order appealed from, bring the claims of the United States within the protection of the federal priority statute?

6. Since the substantial question involved in the decision of the Supreme Court of Florida was whether or not the deposit of the State Treasurer constituted a trust fund, was not the holding of that court to the effect that such deposit was a trust fund in accord with applicable decisions of this Honorable Court?

ARGUMENT

Question 1. Since no appeal was taken from the order of the Circuit Court of Leon County dated May 28th, 1934, determining the rights of the United States to have prior right of participation in the trust fund in the hands of the Receiver, and since the only question presented by the order of October 27th, 1934, from which the appeal was taken, reserved decision on the claims of the United States as to whether the Florida Receiver should pay the claims of the United States out of the residue or whether same should be transmitted to the domiciliary liquidator of the surety company in New Jersey, was the order appealed from a final judgment, so as to confer jurisdiction upon this court to review same by certiorari under the provisions of Section 237, Judicial Code, as amended by the Act of February 13, 1925, paragraph (b), Section 344 Title 28 U. S. C. A?

It will be observed that the order in question (R. 253-254) expressly stated that: "The question of what shall be done with the residue * * and the relative rights of the United States and other creditors whose claims are not secured by the special deposit or trust fund * * * * is reserved for further determination of this court;"

The Court has rendered a decree on May 28, 1934 (R. 198-201), declaring that the Federal priority statute did not give the United States a prior right to be paid out of the trust fund deposit by the Surety Company with the State Treasurer, but that the United States would have

a prior right to participate in any surplus remaining in the hands of the Receiver after the payment of trust fund obligations. This order was a final adjudication of the rights of the United States as to priority of payment out of the trust fund. But, no appeal was ever taken from this decree. The lower court in the particular order appealed from did not pass upon the Federal priority statute. It had done this five months previously.

It seems, therefore, that a consideration of the Federal priority statute is not involved in this controversy; that no federal question arises; that the appeal was taken from the wrong order; that the order from which the appeal was taken was not a final judgment; and that the opinion of the Supreme Court of Florida dealing with the Federal priority statute was mere dictum.

The jurisdiction of this Court to review by certiorari extends only to final judgments or decrees. Locher vs. Schroeder, 13 S. Ct. 934; 149 U. S. 580; Arnold vs. U. S. for Use etc., 44 S. Ct. 144; 263 U. S. 437.

It is true that the opinion of the Supreme Court of Florida dealt with the Federal priority statute, and pronounced certain dicta with an air of finality, but if the basic order from which the appeal was taken was not a final order, the opinion of the Supreme Court of Florida would not make it a final order, particularly when the priority statute was not involved in the order appealed from, but had been previously passed on in the order of May 28, 1934.

Question 2: Was the petitioner adversely affected by the order appealed from, in view of the fact that more than ample funds remained in the hands of the Receiver for the payment of the claims of the United States as well as all other claims against the Receiver?

It appears from the report of the Receiver (R248), and from paragraph 4 of the order appealed from (R. 254), that ample funds remained in the hands of the Receiver with which to pay the claims of the United States and all other claims, but the question as to whether the United States should be paid by the Florida Receiver or whether the residue, after the payment of Florida trust fund claimants, should be transmitted to the Domiciliary Liquidator, had not been determined, and this was the reason the claims of the United States were not then ordered paid. (R. 254).

The United States, therefore, was not adversely affected by the order from which it appealed, and it is not believed that certiorari should issue to settle mere abstract questions of law, and especially when those legal questions were not involved in the order from which an appeal was taken, and, therefore, any judicial pronouncements thereon would be only dicta.

Question 3: Since the funds in the hands of the Receiver were deposited pursuant to a State Statute, enacted by the Legislature of Florida in the exercise of its police power, would not the decision of the Supreme Court of Florida construing such statute, be binding upon this Honorable Court?

Even if the Federal priority statute was involved in the order of October 27th, 1934, it was only incidentally in-

volved. The primary questions arose out of a construction of the Florida Statutes dealing with the deposit of securities by the Surety Company with the State Treasurer, and were: (a) Did the deposit constitute a trust fund? (b) If so, for whom? (c) What priorities did it confer? These were the questions primarily under consideration by the Supreme Court of Florida, the answers to which were all found within the four corners of the State statutes. It was only necessary to determine whether, under the State statutes, the United States was a beneficiary of the trust fund. The Court held that because the State was under no duty and had no power to legislate for the United States, and because Congress had legislated to safeguard the Federal Government against insolvent surety companies, it followed that the United States was not a beneficiary of the trust fund under the State statutes. The petitioner was in a State court, seeking payment out of a fund deposited under a State statute, and which could only be reached pursuant to the State law. If the State statute had made the United States a beneficiary it would have participated primarily with other obligees in surety bonds. If it were not a beneficiary it could not invade the sacred trust fund which was segregated from the general assets of the surety company and deposited with the State Treasurer prior to the accrual of any of the obligations represented in the claims of the United States.

We, therefore, submit that the decision of the Supreme Court of Florida has merely construed Florida Statutes, and that this Honorable Court will not disturb this construction.

Question 4: Since the Florida Supreme Court, in construing a State statute, has held that the fund in the hands of the Receiver is a trust fund for the benefit of those for whom the State had the power and duty to legislate, is a Federal question presented herein merely because of the existence of the Federal priority statute, which this court has held does not abrogate prior liens or bona fide transfers?

Under the third heading in this argument we have tried to show that the determining questions were the purpose, and the effect of the Florida statutes dealing with deposits by a surety company with the State Treasurer, and that if a trust were created only beneficiaries could participate in the fund. This involves no Federal question. Who the beneficiaries were involves no Federal question. However, if a Federal question were incidentally involved as to the effect of the Federal priority statute, upon a valid trust created before the accrual of the obligation to the United States, such question has been previously settled by the decisions of this Honorable Court, wherein it has been held that prior liens or valid transfers are not displaced by the priority statute. Brent vs. Bank of Washington, 10th Pet. 596, 9th L. Ed. 547; U. S. vs. Guaranty Trust Company of New York, 33rd Fed. (2d) 533, Affirmed—50 S. Ct. 212, 280 U. S. 478, 74 L. Ed. 556; Leary vs. U. S. 229 Fed. 660, Affirmed—38 S. Ct. 1, 245 U. S. 1, 62 L. Ed. 113.

Question 5: Do the allegations in the claims of the United States, without the amendments made subsequent to the date of the order appealed from, bring the claims of the United States within the protection of the Federal priority statute?

The only Federal question that could be remotely connected with this litigation is the effect of the Federal priority statute, and in order for the priority statute to be invoked the claimant must show that his claim comes within the priority statute. The right of priority is not an attribute of sovereignty, but depends entirely upon the act of Congress. U. S. vs. State Bank of North Carolina, 6 Pet. 29, 30; 8th L. Ed. 308.

Attention is called to the fact that in the claims filed by the United States in the receivership it appeared that the claims arose out of appearance, or bail bonds in criminal prosecutions and that the obligation was a penal obligation and not a "debt", for which priority is given by the Federal Statute. It did not appear that all of the assets of the insolvent surety company were in the hands of the Florida Receiver, which seems to be an essential requirement in order for priority to attach. U. S. vs. Hooe et al, 3 Cranch 73; Davis vs. Miller-Link-Lbr. Co. 296 Fed. 649; Equitable Trust Co. of New York vs. Conn. Brass & Mfg. Corp. 290 Fed. 701. Neither does it appear from the claims of the United States, at the time of making the order of October 27, 1934, that the Surety Company had made a voluntary assignment. It is true that the United States undertook to amend its claims to make the latter showing, but it did not do so until long after the making of the order appealed from.

We realize that the argument under the fifth heading herein is perilously close to an argument on merits, but it would seem that if the petitioner did not sufficiently show to the lower court that its claims came under the protection of the Federal priority statute that it could not amend its claims after the order was granted and then insist that a Federal question is here involved such as would entitle it to a review by certiorari.

Question 6: Since the substantial question involved in the decision of the Supreme Court of Florida was whether or not the deposit of the State Treasurer constituted a trust fund, was not the holding of that court to the effect that such deposit was a trust fund in accord with applicable decisions of this Honorable Court?

In the case of Blake vs. McClung, 19 S. Ct. 165; 172 U. S. 239, this Court said:

> "It may be appropriate to observe that the objections to the statute of Tennessee do not necessarily embrace enactments that are found in some of the states requiring foreign insurance corporations, as a condition of their coming into the State for purposes of business, to deposit with the State Treasurer funds sufficient to secure policy holders in its midst. Legislation of that character does not present any question of discrimination against citizens forbidden by the Constitution. Insurance funds set apart in advance for the benefit of home policy holders of a foreign insurance company doing business in the state are a trust fund of a specific kind to be administered for the exclusive benefit of certain persons. Policy holders in other states know that those particular funds are

segregated from the mass of property owned by the company and that they cannot look to them to the prejudice of those for whose special benefit they were deposited."

In McCoon vs. Scales, 76 U. S. (9 Wall) 23; 19 L. Ed. 545, the Court said (p. 548 L. Ed.):

"The Legislature of Wisconsin had made provision by special statute for a case in which a bank whose functions had ceased, but which yet owned property and owed debts in Wisconsin, might be sued and the property subjected to those debts. The constitutionality of this act is denied; but no provision of the constitution of Wisconsin, or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a state could not frame laws which would enable her citizens to subject lands of a corporation whose charter had expired to the debts which it owed her citizens."

In Paul vs. Virginia, 8 Wall. 168, 19 L. Ed. 357, a statute requiring corporations to deposit securities was held constitutional.

It will be observed that the decision of the Supreme Court of Florida was based upon the relative rights of the parties existing at the time the deposit was made by the Surety Company with the State Treasurer; and not upon Chapter 16248 of the Acts of Florida of 1933, which latter Act was held to be merely declaratory of what was already the Florida law subject to which the deposited securities were put up to be held, "subjected, or distributed, as occasion might arise", and would not, therefore, disturb vested rights.

Conclusion

It is respectfully submitted for the reasons hereinabove set forth that the petition for certiorari should be denied.

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Of Counsel for D. M. Lowry, Receiver in State of Florida of New Jersey Fidelity & Plate Glass Insurance Co.

APPENDIX

Section 3466 of the Revised Statutes of the United States (U. S. C., Title 31, Sec. 191):

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 6302, Compiled General Laws of Florida:

> *Requirements to do business in this State*—Companies herein described, chartered by this State, or other States or foreign Governments, now doing business in this State, or hereafter doing business in this State, which offer or undertake to become surety upon any bond, or surety contract, before being accepted as surety thereon, shall be required to deposit with the Treasurer of this State bonds of the United States, or bonds of any State of the United States, and which amount according to their market value, to seventy-five thousand dollars which bonds shall be receipted for by the State Treasurer and held or deposited by him. And whenever such company ceases to do business in this State, and has settled up all claims against it, as hereinafter provided, and has been released from all the bonds upon which they have been taken as

sureties said bonds shall be delivered up to the proper party on presentation of the Treasurer's receipt for said bonds. While said bonds are so deposited with the Treasurer, the owner of the same shall be entitled to collect the interest on the same. For the bonds so deposited, the faith of the State is pledged that they shall be returned to the party or parties entitled to receive the same.

Sections 6303, Compiled General Laws of Florida:

Final judgment against surety company.—Whenever final judgment has been rendered against any surety company on a fidelity or surety bond, said surety shall pay the same within thirty days. Upon notice of failure to pay said amount within said [illegible], the State Treasurer shall retain said bonds, or so much thereof as may be necessary to cover said judgment and costs, subject to the order of the court trying any suit that may be brought upon such bond.

Chapter 16248, Laws of Florida, 1933:

SECTION 1. That Section 4340 of the Revised General Statutes of Florida of 1920, the same being Section 6303 of the Compiled General Laws of Florida 1927, be and the same is hereby amended to read as follows:

"6303 (4340) FINAL JUDGMENT AGAINST SURETY COMPANY.

"Whenever a final judgment has been rendered against any surety company on a fidelity, appearance, supersedeas or surety bond, the surety on said bond shall pay the same within thirty days. Upon notice of failure to pay the amount due under said bond within said time, the State Treasurer shall retain the bonds or securities deposited with him by said surety

company under Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, or as much thereof as may be necessary to cover said judgment and costs, subject to the order of the Court trying any suit that may be brought upon said bond: Provided, however, that in the event of the adjudication of insolvency of any such surety company by a court of competent jurisdiction, or in the event its assets should be placed in liquidation in the State of its incorporation, the Court of Chancery, at the seat of Government in Florida shall have jurisdiction, upon bill filed by any party in interest, to take charge of the securities so deposited with the State Treasurer under the provisions of Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, together with any other assets of such surety company, which may be marshaled in the State of Florida, to direct a sale of the said securities at public or private sale and on sueh terms as the said court deems proper and, after paying all costs and expenses, including reasonable counsel fees incurred in connection with said proceedings, all as allowed by the court, to distribute the proceeds of the sale of said securities proportionally among all of the Florida creditors who may make proof of their claims against any such surety company to the satisfaction of said court, the surplus, if any, to be disposed of by proper order of such court. The said court is empowered to ascertain, as far as practicable, the names and addresses of all Florida creditors and the amounts due and owing to them under bonds given by said surety company, and to notify the Florida creditors to make

proof of their claims and to determine the validity and the amount due each of them. The claims of all Florida creditors of any such surety company not reduced to final judgment prior to the time the said Court of Chancery takes charge of such Florida assets shall participate in the proceeds of the sale of said securities and assets only on a proportional basis with other Florida creditors. Upon the said Court of Chancery assuming jurisdiction of the said securities and assets of such surety company, all actions against the said company and the said securities and assets shall be stayed, pending the further orders of said Court and the State Treasurer, and the State of Florida shall thereby be absolved from any further liability on account of said securities, and the right of said surety company to transact business in this State shall cease and determine.

"SECTION 2. All laws and parts of laws in conflict with this Act are hereby repealed.

"SECTION 3. This Act shall take effect upon becoming a law.

"Approved May 10, 1933."